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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1974
No. 74-386

STATE OF IDAHO,
STATE TAX COMMISSION,
Petitioner,
vs.
MARGARET ROSE MAHONEY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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MARGARET ROSE MAHONEY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioner respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Idaho, entered herein on July 8, 1974, reaffirming the Idaho Supreme Court's Decision in John George Mahoney, Plaintiff, Margaret Rose Mahoney, Plaintiff-Respondent v. State of Idaho, State Tax Commission, Defendant-Appellant, 524 P. 2d 187, *infra*, App. II.

OPINION BELOW

The final Order of the Court below on the Petition for Rehearing reaffirmed Mahoney, supra, *infra*, App. I.

JURISDICTION

The final order of the Idaho Supreme Court was made and entered on July 8, 1974, and is appended hereto, *infra*, App. I. The full opinion of the Court below, which is the opinion sought to be reviewed, was filed on September 5, 1973, *infra*, App. II. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Does the imposition of the Idaho tax on retail sale of cigarettes on sales between a private Indian operated business enterprise on the Coeur d'Alene Indian Reservation and passing non-Indian motorists:

1. Constitute an unwarranted extension of state-taxing authority over the Coeur d'Alene Indians in violation of this Court's recent decision that state income taxes could not apply to Navajo Indians on the Navajo Reservation (*McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164)?

2. Constitute an infringement upon any alleged federal right of the Coeur d'Alene Tribe to self government?

3. Violate U.S. Const. Art, 1 §8 (The Commerce Clause) as an unreasonable or unwarranted state interference or burden on Indian commerce?

4. Violate 4 U.S.C. §§105-110 (The Buck Act)?

5. Otherwise attempt to impose state taxes on Indians in violation of federal law?

CITATIONS

The case involves the following provisions of the United States Constitution:

1. "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform through the United States; . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ." *U.S. Const.*, Art 1 §8.

2. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, and the courts of law, or in the heads of departments." *U.S. Const.* Art. 2, §2, Cl. 2.

The case involves the following provisions of the Constitution of the State of Idaho and the Organic Act of the Territory of Idaho:

1. "§19. Religious freedom guaranteed-Disclaimer of title to Indian lands.-It is ordained by the State of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of such state shall ever be molested in person or property on account of his or her mode of religious worship. And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within the said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States, residing without the said State of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. That no taxes shall be imposed by the state on the lands or property therein belonging to, or which hereafter be purchased by, the United States, or reserved for its use. And the debts and liabilities of this territory shall be assumed and paid by the state of Idaho. That this ordinance shall be irrevocable, without the consent of the United States and the people of the State of Idaho." *ID Const.* Art. 21, §19.

2. "Sec. 1. Territory of Idaho - Boundaries - Construction of Act.—all that part of the territory of the United States included within the following limits,

to wit: beginning at a point in the middle channel of the Snake River where the northern boundary of Oregon intersects the same; then follow down the said channel of Snake River to a point opposite the forty-ninth parallel of latitude; thence east along said parallel to the twenty-seventh degree of longitude west of Washington; thence south along said degree of longitude to the northern boundary of Colorado territory; thence west along said boundary to the thirty-third degree of longitude west of Washington; thence north along said degree to the forty-second parallel of latitude; thence west along said parallel to the eastern boundary of the State of Oregon; thence north along said boundary to the place of beginning. And the same is hereby created into a temporary government, by the name of the territory of Idaho: provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory or changing its boundaries in such manner and at such time as Congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States: provided, further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such right shall remain inextinguished by treaty between the United States and such Indians, or include any territory, which, by treaty with the Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such

territory shall be excepted out of the boundaries and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States, to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never been passed." *Idaho Organic Act. §1.*

The case involves the following provisions of the United States Code:

1. 4 U.S.C. §§105 through 110 and more particularly 4 U.S.C. §§109 and 110 (e), *infra*, App. VII.

2. 15 U.S.C. 375-378 *infra* App. VII.

The case involves the following provisions of the *Idaho Code:*

1. §9-101(8), Idaho Code, *infra*, App. IX.

2. §63-2501, as enacted in 1945, *infra*, App. IX.

3. §63-2503, Idaho Code, as amended in 1972, *infra*, App. IX.

4. §63-2508, Idaho Code, as enacted in 1945, *infra*, App. IX.

STATEMENT OF THE CASE

John George Mahoney, a member of the Coeur d' Alene Indian Tribe and the original Plaintiff in this

action, engaged in a business consistng of the retail sale of cigarettes. The business was located in northern Idaho and was adjacent to U.S. Highway 95, which is the major North-South Highway in northern Idaho, and which bears a large volume of daily traffic. Respondent's customers consisted of passing motorists, and the business enterprise made a substantial portion of its sales to non-Indian members of the general public. The business enterprise was located on allotted trust land within the interior boundaries of the Coeur d'Alene Indian Reservation.

Petitioner insisted that Respondent affix stamps evidencing compliance with the Idaho Cigarette Tax Act imposed by §63-2503, *Idaho Code*. At the time this action arose, the tax was imposed at the rate of 7/20ths of one cent per cigarette or seven cents for a standard package of twenty cigarettes. The tax was subsequently amended to the present rate of 9/20ths of one cent per cigarette. *Session Laws* of 1972, Ch. 275 Pg. 666, (App. IX.)

Petitioner insisted that the state cigarette tax imposed by §63-2503, *Idaho Code*, be complied with only as to cigarettes sold to non-members of the Coeur d' Alene Tribe; Petitioner has not contended that sales to tribal members are taxable under the state cigarette tax. The state cigarette tax is imposed on "the retail sale of cigarette".

The cigarettes held for sale by Respondent were obtained by Respondent personally in the State of Washington and imported into the State of Idaho

directly into the Coeur d'Alene Indian Reservation without passing through any part of Idaho not within the Coeur d'Alene Reservation.

After Petitioner's attempt to obtain compliance with the state cigarette tax was unsuccessful, Petitioner levied on Respondent's stock of goods. After this action was instituted for recovery of the goods, the goods were sold pursuant to stipulation of the parties. The issues presented to the Courts below consist solely of the applicability of the state cigarette tax to the cigarettes held for sale to non-Indian customers, and no issue was presented concerning the power of the State Tax Commission to seize the cigarettes in question if they were in fact taxable under the state tax.

Unlike Reservations frequently dealt with by this Court, the Coeur d'Alene Reservation contains substantial lands within its exterior boundaries that are in private, non-Indian ownership. Many of the persons residing on the Reservation are not members of the Tribe, and the Reservation contains several of the larger communities in Northern Idaho. Land ownership is "checkerboarded" with interspersed parcels of land in private and Indian or federal ownership.

There was no Coeur d'Alene tribal interest in Respondent's business enterprise; it was stipulated that Respondent was conducting a private business enterprise, and was not performing a tribal function.

Pending trial, the present Respondent was sub-

stituted as Plaintiff; it is undisputed that she succeeds to the original Plaintiff's rights in this action.

The State trial Court in a Memorandum Decision and Judgment attached as Appendix IV held that the Idaho Cigarette Tax Act did not apply to cigarettes held on the Coeur d'Alene Reservation for sale to non-Indian customers, in the absence of a statute specifically authorizing taxation of the cigarettes by the State. The Idaho Supreme Court in the Decision attached as Appendix II affirmed the trial Court's decision, two Justices dissenting.

The question of John George Mahoney's immunity from state cigarette taxation was first raised in his Complaint by an allegation that "the state tax commission has no jurisdiction over commerce on Indian trust land and had no right to go thereon and seize cigarettes". Complaint, Paragraph IV, *infra*, App. III. The Court in the first instance disposed of the question by concluding as a matter of law as follows:

> "The 784 cartons of cigarettes which are the subject matter of this action and sales thereof by plaintiffs on trust lands within the Coeur d'Alene Indian Reservation were not subject to the excise taxes of the State of Idaho". *Amended Findings of Fact and Conclusions of Law, infra*, App. V.

The Idaho Supreme Court determined,

> "that the principles enunciated in *McClanahan* are applicable in cases such as this involving a state's attempt to tax

non-reservation sales consumated by Indian sellers, even though *McClanahan* itself involved the state's attempt to tax personal income earned by an Indian solely from reservation sources". *Mahoney v. State Tax Commission*, 524 P.2d 187, *infra*, App.II.

The Court further determined as follows:

> "In the case before us today, the incidence of the tax falls squarely upon sales by an Indian on a reservation; this tax is nothing less than a direct tax upon commerce with the Indian tribes, and 'such taxation is not permissible absent congressional consent'." *Mahoney*, supra, p. 192, *infra*, App. II.

And finally, the Court concluded as follows:

> "In the absence of congressional consent, the Idaho State Tax Commission had no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians. U.S. Const. Art. 1, Sec. 8, Cl. 3. Where, as here, Congress has manifested its intent to deny the states the power to collect such a tax it is irrevelant that its imposition would not infringe upon tribal self-government. *McClanahan v. State Tax Commission of Arizona*, supra. The decision of the District Court is correct and accordingly must be affirmed." *Mahoney*, supra, p. 195, *infra*, App. II.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to provide guidance and direction to Petitioner and other States in the

unresolved conflicts over the effect of the previous decisions of this Court on the obligation of Indian citizens to participate in state taxing programs when they engage in commerce with non-Indians. Throughout the history of our Nation, no matter has exhibited so much potential destructiveness as distinctions between citizens based upon national background or race. A long series of decisions of this Court, culminating in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, adequately demonstrates that as an Indian Respondent is entitled to certain additional "rights" or immunities from state taxation not enjoyed by non-Indian state citizens. As state tax administrators, Petitioner must deal with the potentially explosive difficulties inherent in the right of Respondent and other Indian people, to avoid payment of state taxes because of their race or national origin, and at the same time accommodate both state revenue needs and a reasonable insistence by non-Indian state citizens that any exemption or immunity for Indian citizens go no further than required by appropriate federal law. A long series of decisions by this Court provide reasonable guidance in areas in which an Indian citizen has not engaged in business activities substantially involving non-Indian citizens, or not otherwise interfering with questions involving substantial state interests. In the *Warren Trading Post v. Arizona Tax Comm.* 380 *U.S.* 685, 14 L.Ed.2d, 165, 85 S.Ct. 1242, case, for example, this Court was presented with an issue involving a sales tax on a sale occurring on the Navajo Reservation and which was made to a Navajo Indian. The Court, however, expressly disclaimed any statement on

what might be the result had the sale been made to a non-Indian. In the recent case of *McClanahan*, supra, the Court again spoke only to problems involved in an income tax on the individual Indian himself.

The decision of the Idaho Supreme Court has effectively prevented imposition of the Idaho cigarette tax act on cigarettes sold on the Coeur d'Alene Indian Reservation. The direct effect of this, as the Court itself noted, is to give merchants on the Coeur d'Alene Reservation a ninety cents per carton competitive advantage over persons not entitled to the immunity rule announced by the Idaho Supreme Court. The disrupted impact of such a situation on relations between Indian and non-Indian citizens of the state is severe; the problem is particularly distressing in the present situation in which there has been no definitive ruling of this Court on the matter, and in which as outlined in this Petition, similar treatment is not effectively given between Indian and non-Indian citizens of other states.

2. In the last term of this Court, the case of *Tonasket v. State*, 488 P. 2d 281 Wash. 1971 (Petition for Cert pending, Docket 71-1031) involved issues in part substantially identical with the question presented by this Petition for Certiorari. This Court, recognizing both the substantiality of the issues and the need for a thoughtful and thorough consideration of them, remanded to the Washington Supreme Court the *Tonasket* case. The remand was issued so that the Washington Supreme Court might more fully consider the effect of 67 Statutes at Large, p. 589.

While the Idaho Supreme Court in the present case

assumed that the Navajo and Coeur d'Alene Reservations were identical, and that the Arizona income tax dealt with in the *McClanahan* case could be equated with the Idaho cigarette tax, the analogies are simply inaccurate. First, the Navajo Reservation, which is an autonomous and viable self-government entity with a long history of internal autonomy and self-control cannot be equated with the Coeur d'Alene Reservation. The Coeur d'Alene Reservation has neither a long history of viable and independent self-government nor does the Coeur d'Alene Reservation consist almost entirely of lands still held by the federal government in trust for Indian people, or the Indian people themselves. Finally, and most importantly, individuals on the Coeur d'Alene Reservation are an integral part of the larger social and economic community of Idaho, whether or not they happen to be Indian citizens. In such a situation, the individuals have responsibilities not only to their tribe but also to the state; while properly they might well not contribute to the economic sustenance of the state, they have a basic obligation not to use a personal immunity based upon their historical origin to effectively destroy competing non-Indian owned enterprises. In short, while they may avoid taxes in fact imposed upon and borne by Indian people, they should not be allowed to avoid participation on state taxing programs where the burden of such taxes is not borne by the Indian people but non-Indians customers.

Secondly, Petitioner cannot believe the *McClanahan* decision was intended by this Court to apply to in-

stances involving matters substantially affecting legitimate state interest. The Idaho Supreme Court failed to recognize substantial legal and practical effects of the differences between an income tax, such as dealt with by this Court in *McClanahan,* and a tax on a transaction, the retail of cigarettes. An income tax, by its nature, is a tax on an individual. The ability of a state to levy such tax must depend directly upon the ability of the state to tax the individual himself. In addition, exemption from such a tax does not grant the individual a special commercial advantage not enjoyed by any other merchant. Finally, the advantage of such an exemption cannot be "bartered" to a non-Indian customer through the sale of untaxed goods. None of these things are true of a tax on a transaction in which a non-Indian purchases goods from an Indian. By voluntarily engaging in commercial transactions in which goods are sold to non-Indians, the seller has himself voluntarily entered into matters involving substantial state interest; he does not take this critical step merely through the earning of income on a reservation as was done in the *McClanahan* fact setting.

This Court carefully limited its decision to the particular taxes presented. Thus, in *Mescalero,* the Court interpreted the *McClanahan* decision, supra, as carefully limited to taxes on Indian *income,* or Indian *lands.* The issues presented to the Idaho Supreme Court have not previously been determined by this Court; they certainly differ substantially from those presented in *McClanahan.*

Finally, the Idaho Supreme Court's reliance upon

either the Commercial Clause or 40 U.S.C. §§105-110 (The Buck Act) is completely unprecedented. No modern decision of this Court has attempted to apply principles derived from interstate or foreign commerce to the area of state taxation of reservation Indians. If such a new and novel approach is to be adopted, it should be considered by this Court because of its far reaching implications. While it has been frequently suggested that the basic source of federal power over commerce with Indians as well as Indian tribes stems from the Commerce Clause, the Idaho Supreme Court went far beyond this assumption and attempted to apply directly principles derived from rules governing interstate commerce which is completely unprecedented and which this Court has not attempted to do in the past.

3. The recent cluster of decisions from State and lower federal Courts attempting to deal with the acute state tax problems presented by transactions between Indians and non-Indians has only accentuated the confusion and disarray in an area which cries for leadership and direction from this Court. The course of *Tonasket v. State*, 488 P. 2d 281 Wash. 1971 (Petition for Cert. pending, Docket 71-1031) through the Washington Court, to this Court and back to the Washington Court has already been traced. In *Walker River Paiute Tribe and Stephen King v. John Sheehan, et al*, Civ. No. R-2888-BRT (D.C. Nev., May 3, 1974) the United States District Court for the District of Nevada held on principles analogous to those of the Idaho Supreme Court in the present controversy, that the Nevada cig-

arette tax could not be imposed on cigarettes sold to non-Indian customers on the Paiute Reservation. On the other hand, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana ("Tribe") et al. v. John C. Moe, et al,* Civil No. 2145 (D.C. Mont. May 9, 1974), a three-judge panel held that the Montana sales/use tax on cigarettes could be applied to sales of cigarettes on Montana reservations to non-Indians but could not be imposed on sales of cigarettes to tribal members. The Montana District Court adopted an entirely different reading of this Court's decision in *McClanahan.* The divergence in the approaches of these Courts clearly reflects the difficulty; the recent decisions in *McClanahan* and *Mescalero* do not provide answers to the problem presented in sales or use tax issues. This is evidenced by the fact that the Montana Court in *Confederated Salish et al v. John C. Moe, et al,* supra, concluded the matter was not governed by *McClanahan* and *Mescalero,* while the Nevada Court felt that at least by analogy adequate guidance was presented in *McClanahan* and *Mescalero* to dictate a decision directly contrary to that of the Montana Court. *Walker River Paiute Tribe and Stephen King v. John Sheehan, et al,* Civ No. R. 2888-BRT, (D.C. Nev., May 3, 1974.).

The Idaho Supreme Court in the present case attempted to discern the direction provided by this Court. The majority felt that by the remand of *Tonasket* this Court had somehow indicated that the *McClanahan* decision applied to *sales* as well as income taxes.

"In its decision in the case, the Washing-

ton Supreme Court held that the Washington cigarette tax could be applied to the on-reservation sale of cigarettes by an Indian, most of whose customers were non-Indians.

> "In vacating the Washington judgment, the Supreme Court of the United States ordered the Supreme Court of Washington to reconsider its decision in light of the former's recent unanimous decision in McClanahan v. State Tax Commission of Arizona,__ U.S., 93 S. Ct. 1257 (1973). The Supreme Court of the United States thereby indicated that the principles enunciated in *McClanahan* are applicable in cases such as this involving a state's attempt to tax on-reservation sales consummated by Indian sellers, even though *McClanahan* itself involved a state's attempt to tax personal *income* earned by an Indian solely from reservation sources". *Mahoney v. State Tax Comm.* 524 P. 2d 187.

On the other hand, the dissent was equally troubled by the lack of guidance:

> "Certainly, the opinion of the Supreme Court of Washington in *Tonasket* is not binding on this Court. Nevertheless, I find it well-reasoned, scholarly and highly persuasive. In my judgment the cavalier treatment of *Tonasket* by the United States Supreme Court only muddies further the troubled waters surrounding state jurisdiction over Indians. The Court's opinion in *Mescalero Apache Tribe v. Jones*, __*U.S.*__, 93 S. Ct. 1267 (1973) further compounds this confu-

sion. *Mescalera* was issued the same day as *McClanahan*.

"... As a result of *McClanahan* and *Mescalero* and the lack of guidance offered by *Tonasket*, the courts are left to their own resources in grappling with the mind-boggling distinction between *Mescalero* and *McClanahan* ...." *Mahoney v. State Tax Comm.* 524 P. 2d 187.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Idaho.

Respectfully submitted,

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WILLIAM McDOUGALL
ASSISTANT ATTORNEY
GENERAL

ROBERT L. MILLER
CHIEF DEPUTY
ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of October, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Jerrold E. Park, McFadden & Park, Attorneys at Law, St. Maries,

Idaho 83861; Robert D. Dellwo, Dellwo, Rudolf & Schroeder, 1016 Old National Bank Building, Spokane, Washington 99201, and Daniel H. Israel, Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302, Hamilton & Hamilton, Attorneys at Law, 203 Elder Bldg., Coeur d'Alene, Idaho 83814, counsel for Respondent. I further certify that all parties required to be served have been served.

WILLIAM McDOUGALL
WILLIAM McDOUGALL
ASSISTANT ATTORNEY
GENERAL
STATE OF IDAHO

APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 11016

JOHN GEORGE MAHONEY, Plaintiff,	)	
MARGARET ROSE MAHONEY, Plaintiff-Respondent,	)	Coeur d'Alene, May
v.	)	Term, 1974
STATE OF IDAHO, STATE TAX COMMISSION Defendant-Appellant.	)	Filed: July 8, 1974 R. H. Young, Clerk

ON PETITION FOR REHEARING
DONALDSON, J.

The petition for rehearing in the above entitled action was granted and reargued. The Court has reviewed the record, considered the arguments presented by counsel, and we continue to adhere to the views expressed and the conclusion reached in our earlier opinion.

McQUADE and McFADDEN, J.J., concur.

SHEPARD, C. J. adheres to his dissent in the earlier opinion.

BAKES, J. adheres to his special concurrence and dissent in the earlier opinion.

APPENDIX II

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 11016

JOHN GEORGE MAHONEY Plaintiff, MARGARET ROSE MAHONEY, Plaintiff-Respondent,	)	
v.	)	Coeur d'Alene, October term, 1972 Filed: September 5,
STATE OF IDAHO, STATE TAX COMMISSION Defendant-Appellant.	)	1973 R. H. Young, Clerk.

Appeal from the District Court of the First Juidicial District of the State of Idaho, Benewah County. Hon. Watt E. Prather, District Judge.

Appeal from judgment restraining the State of Idaho from taxing the on-reservation sale of cigarettes by members of Indian tribe and allowing recovery for cigarettes seized by the State. *Judgment Affirmed.*

W. Anthony Park, Attorney General, and Robert L. Miller, Deputy Attorney General, Boise, for appellant.

McFadden & Park, St. Maries, and Hamilton & Hamilton, Coeur d'Alene, for respondent.

DONALDSON, C. J.

The original plaintiff in this action was John George Mahoney, who sought to recover 784 cartons of cigarettes seized by the defendant-appellant Idaho State Tax Commission and to restrain the Commission from interfering with the plaintiff's cigarette-vending business. Subsequent to the filing of this action, the respondent Margaret Rose Mahoney acquired all interests in the confiscated property and was, therefore, substituted as plaintiff for John George Mahoney, as to whom the action was dismissed.

The respondent and her predecessor in interest are both members of the Coeur d'Alene Indian Tribe. On June 21, 1968, an agent of the Tax Commission seized the respondent's cigarettes because they did not bear Idaho cigarette tax stamps. At the time of the seizure, the cigarettes were located at the respondent's on-reservation tobacco shop and were being held for sale to both Indian and non-Indian purchasers. A substantial portion of the respondent's sales were made to non-Indian members of the general public. The cigarettes seized by the State were purchased by the respondent in Spokane, Washington, and transported to the reservation in the respondent's personal automobile.

The respondent's concession is located one mile north of Plummer, Idaho, just off U.S. Highway 95, a major north-south route through this state, carrying a large volume of daily traffic. The respondent's business is a private enterprise in no way connected with tribal business, and its owner is not engaged in performing a tribal function.

Since the cigarettes seized by the Commission were perishable, the parties agreed that they should be sold and that the proceeds of sale ($1,484.15) should be held pending the outcome of the action.

Section 63-2503 of the Idaho Code provides that "(t)here is hereby levied, and there shall be collected as hereinafter provided, a tax upon *the retail sale of cigarettes*". (Emphasis added) As amended in 1972, this section currently imposes this sales tax at the rate of 9/20 of 1c per cigarette, or 90c per standard carton of 200 cigarettes. If the respondent's sales are exempt from this tax, she would obviously have a 90c-per-carton competitive advantage over vendors not located on Indian land.

The district court held that Idaho lacks jurisdiction to tax the on-reservation sale of cigarettes by Indians. Judgment was entered in favor of the respondent Indian for $1,484.15, plus interest and costs; in addition, the court permanently enjoined the Tax Commission from interfering with the operation of the respondent's business. On appeal, the Tax Commission asserts that the cigarettes were seized only because they were being held *for sale to non-Indians*. The appellant disclaims any right to tax on-reservation sales by Indians to Indians. Nor does the appellant challenge the district court's finding that the Coeur d'Alene Indian Tribe has never entered into any agreement consenting to the taxation of its members by the State of Idaho.

I

During the pendency of this appeal, the Supreme Court of the United States vacated the judgment of the

Washington Supreme Court in *Tonasket v. State*, 488 P. 2d 281 (Wash. 1971), relied upon by the appellant herein. *Tonasket v. Washington*, __U.S, __, 41 LW 4546 (April 24, 1973) (per curiam). In its decision in the case, the Washington Supreme Court held that the Washington cigarette tax could be applied to the on-reservation sale of cigarettes by an Indian, most of whose customers were non-Indians.[1] In vacating the Washington judgment, the Supreme Court of the United States ordered the Supreme Court of Washington to reconsider its decision in light of the former's recent unanimous decision in *McClanahan v. State Tax Commission of Arizona*, __U.S. __, 93 S.Ct. 1257 (1973). The Supreme Court of The United States thereby indicated that the principles enunciated in *McClanahan* are applicable in cases such as this involving a state's attempt to tax on-reservation sales consumated by Indian sellers, even though *McClanahan* itself involved a state's attempt to tax personal *income* earned by an Indian solely from reservation sources.

The holding of the Court in *McClanahan* is perhaps

[1] The Washington Court distinguished Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) (invalidating a state gross sales tax as applied to sales made to reservation Indians by federally licensed Indian traders), on three grounds, saying that the third was the most significant: (1) Tonasket had no federal license; (2) the bulk of his trade was with non-Indians; and (3) his tribe had submitted itself to the jurisdiction of the state, and the state had assumed such jurisdiction, as permitted by federal law. The 1953 Act enabling certain states to unilaterally assume jurisdiction in Indian country (Public Law 280, 67 Stat. 588, Sec. 7) was repealed by the 1968 Civil Rights Act (Public Law 90-284, 82 Stat. 79, Title IV, Sec. 403(b)), but the 1968 Act specifically provides that "such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal." 25 U.S.C.A. Sec. 1323 (b); Boyer v. Shoshone-Bannock Indian Tribes, 92 Ida. 257, 261, 441 P.2d 167 (1968). A state may now assume jurisdiction over reservation Indians only "with the consent of the tribe occupying the particular Indian country." 25 USCA Secs. 1321(a), 1322(a). *See* McClanahan v. State Tax Comm'n of Ariz., __U.S.__, 93 S. Ct. 1257, 1265 (1973).

best described by the Supreme Court itself in *Mescalero Apache Tribe v. Jones*, ___U.S. ___, 93 S.Ct. 1267, 1270 (1973), released the same day as *McClanahan:*

> "(I)n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona*, ___U.S. ___, 93 S.Ct. 1257, 35 L. Ed.2d ___, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional conent."

II

The federal government's authority over Indian matters derives from the Federal Constitution's delegation to it responsibility for regulating commerce with Indian tribes and for making treaties. *McClanahan v. State Tax Comm'n of Arizona, supra* at 1262 n. 7; *U.S. Const.* Art. I, Sec. 8, cl. 3; Art. II, Sec. 2, cl. 2. Under Article I, section 8, clause 3 of the United States Constitution, the Congress has the power "(t)o regulate commerce with foreign nations, and among the several states, *and with the Indian tribes.*" (Emphasis added).

It is beyond dispute that the Commerce Clause would preclude the imposition of Idaho *sales* tax upon sales which are consummated in a sister state. *Evco v. Jones*, ___U.S. ___, 93 S.Ct. 349 (1972) (per curiam); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944). For Idaho to impose a tax on such transactions "would be to project its powers beyond its boundaries and to tax an in-

terstate transaction." *McLeod v. J. E. Dilworth Co., supra* at 330. As the United States Supreme Court went on to say in *McLeod:*

> "(A) tax on an interstate sale like the one before us (unlike a use tax) involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several states. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." 322 U.S. at 330-331.

Of course, the *McLeod* case dealt with commerce "among the several states"; but by its own terms, the Commerce Clause applies with equal force to commerce "with the Indian tribes." It follows, therefore, that the Commerce Clause precludes the imposition of Idaho sales tax upon the on-reservation sale of cigarettes by members of an Indian tribe to non-Indian purchasers. *See McClanahan v. State Tax Comm'n of Arizona, supra.*

The tax levied upon the respondent by Idaho is characterized by the operative statute itself as "a Tax upon the retail sale of cigarettes." I.C. Sec. 63-2503. In this case, the state is attempting to tax sales occurring within the boundaries of an Indian reservation, not sales occurring within Idaho's domain. *Idaho Organic Act*, Sec. 1; *Idaho Const.* Art. 21, Sec. 19 ("Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.") *Compare Worcester v. Georgia*, 31 U.S. 515, 560-561

(1832) *and Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 441 P.2d 167 (1968) *with McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). To paraphrase *McLeod*, a tax on sales made by Indians on Indian reservations involves an assumption of power by a state which the Commercial Clause was meant to end. That clause vested in Congress, not in the states, the power of taxing a transaction forming an unbroken process of commerce with the Indian tribes. *McLeod v. J. E. Dilworth Co., supra.* Here, as in *McClanahan*, the tax imposed may be successfully resisted because "the State is totally lacking in jurisdiction." 93 S.Ct. at 1267.

The appellant tax commission argues, somewhat weakly, that it can collect cigarette tax from the respondent because her cigarettes became subject to the state's taxing jurisdiction when they passed through non-reservation Idaho territory while in transit to the respondent's place of business on the reservation. This argument is based upon I.C. Sec. 63-2501, which in pertinent part provides:

> "It is the intent and purpose of this act to levy a tax *on all cigarettes* sold, used, consumed, *handled* or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes." (Emphasis added.)

We may assume *arguendo*, without deciding, that I.C. Sec. 63-2501 is effective to make the handling of cigarettes an incidence of taxation, despite the more specific language of I.C. Sec. 63-2503—i.e., "there is hereby

levied, and there shall be collected as hereinafter provided, a tax *upon the retail sale of cigarettes*" (emphasis added). The appellant's contention still must fail, for two reasons: First, as the respondent correctly points out, nothing in the record affirmatively indicates that the respondent's cigarettes ever passed through non-reservation Idaho territory. We may take judicial notice of the geographical facts that the western boundary of the Coeur d'Alene Indian reservation is contiguous to Washington's eastern border, and there are roads going from the vicinity of Spokane directly onto the reservation. Idaho Dep't. of Highways, 1973 Official Highway Map; *see* I.C. Sec. 9-101, subd. 8. Therefore, it is not only possible but quite probable that the cigarettes in question traveled from Spokane to the respondent's place of business on the reservation without ever passing through non-reservation Idaho territory. Second, it is elementary hornbook law that "the states may not tax property in transit in interstate commerce." *Minnesota v. Blasius*, 290 U.S. 1, 9 (1933). Thus, for example, Arkansas has no authority to tax cigarettes in transit from Missouri to Texas, *Pfeiffer v. State*, 295 S.W.2d 365 (Ark. 1956) (excise tax); *see* Annot., 46 A.L.R. 3d 1342, 1352 (1972). It would seem to follow that a state may not tax goods in transit from a sister state to reservation Indians. U.S. Const. Art. I, Sec. 8, cl. 3.

Also relied upon by the appellant is *Makah Indian Tribe v. Tax Comm'n*, 434 P.2d 580 (Wash. 1967), *appeal dismissed for want of a substantial federal question*, 393 U.S. 8 (1968) (mem.), in which the Washington Supreme Court rejected a Commerce Clause

challenge and held that Washington could collect its cigarette tax from off-reservation, non-Indian wholesalers who supply their products to retail outlets doing business on a reservation. The facts of that case distinguish it from the case at bar. As the Washington court itself indicated:

> "It is noted that, in its practical application, the Washington cigarette tax applies to and is paid by the wholesalers who distribute the cigarettes to retail outlets for resale. At the time the tax is paid and the tax stamps evidencing payment are affixed to a package, *the cigarettes are the inventory of non-Indian wholesalers conducting their business activities wholly outside of any Indian reservation;* the cigarettes have neither been specifically identified as those to be sold on an Indian reservation nor as those to be sold at retail to Indians.
>
> * * *
>
> "(T)he tax here involved does not represent state legislation 'on the subject' of Indian trading, but rather upon the subject of the wholesale distribution *activities carried on wholly outside of any Indian reservation.*
>
> * * *
>
> "Neither the plaintiff Tribe nor any of its members are cigarette wholesalers. *The tax on cigarettes is not collected by the State of Washington from the Makah Tribe or from any members of that Tribe. It is collected only from wholesalers and distributors as a result of their doing business outside the boundaries of any Indian reservation.*
>
> " * * * (T)he incidence of the tax oc-

curred *outside of any Indian reservation and prior to the entry of the cigarettes into Indian commerce.*" 434 P.2d at 581-582 (emphasis added).

In the case before us today, the incidence of the tax falls squarely upon sales by an Indian on a reservation; this tax is nothing less than a direct tax upon commerce with the Indian tribes, and "such taxation is not permissible absent congressional consent." *Mescalero Apache Tribe v. Jones, supra* at 1270 (summarizing the holding of *McClanahan v. State Tax Comm'n of Arizona, supra).*

III

The case at bar is not, moreover, merely one in which congressional consent is absent; rather, it is one in which congressional denial of the power asserted is manifest. In passing the Buck Act, now 4 U.S.C.A. Secs. 105-110, Congress in effect stated its intention to maintain the existing tax exempt status of sales made by reservation Indians. The Buck Act permits states to levy sales, use, or income taxes within any federal area (meaning "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States," 4 U.S. C.A. Sec. 110(e). But the Buck Act also expressly provides that: "Nothing (herein) shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." 4 U.S.C.A. Sec. 109. The Buck Act was approved by the Senate on September 30, 1940, and by the House on October 1, 1940. When Congress excepted Indians "not otherwise taxed," it must have been aware of two opinions released by the

Solicitor of the Interior Department earlier in 1940. In an opinion of May 8, 1940, the Solicitor held:

> "Traders on Indian reservations who are non-Indian * * * must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians. *Traders who are themselves Indians are not subject to the State laws whether they deal with Indians or non-Indians.*
>
> * * * Where traders are not located on Indian reservations they are, in my opinion, responsible for the State taxes and subject to license whether or not they are Indians and whether or not they deal with Indians." 57 I.D. 124, 126 (1940) (emphasis added), *overruled in part as to another holding*, 58 I.D. 562, 567 (1943), *cited with approval in* Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U. S. 685, 690 (1965), *and in* 58 I.D. 562, 563.

Later in May, 1940, in an opinion of obvious relevance to the case at bar, the Solicitor ruled that a state tax on the selling of tobacco products could not be applied to the selling of such products by the commissary of the Menominee Indian Mills to employees and the general public. Said the Solicitor:

> "III. Application of State Sales Tax on Tobacco Products

"The Wisconsin laws of 1939 (chs. 433, 518) place an occupational tax on the sale or other disposition of tobacco products except in the case of sales 'for shipment in interstate or foreign commerce.' Manufacturers and wholesalers are required to pay the tax by purchasing and affixing State stamps on the tobacco products. The statute makes it unlawful for other than registered salesmen to sell tobacco products in the State or to purchase such products from other than licensed wholesalers. Under this law the State authorities claim from the Menominee Indian Mills several hundred dollars in taxes based on the inventory of tobacco products on hand in the mills' commissary as of the date of the passage of the act.

* * *

"(2) The application of this tax to the Menominee Indian Mills would constitute a regulation of trade with the Indians which is beyond the power of the State. Commerce with Indian tribes might have been included in the exceptions provided in the State law along with the exception of sales in interstate and foreign commerce, since all three such types of commerce are placed by the Constitution under the regulatory power of Congress. In my memorandum of February 4, 1938, *supra*, holding that State sales taxes did not apply to purchases made by or from Indians on Indian reservations, I referred to the fact that it was well established that Indians are not amenable to State laws while on their reservations unless expressly subjected to those laws by Congress. *The Kansas Indians*, 5 Wall 737,

755, 756; *United States v. Kagama*, 118 U.S. 375; *United States v. Rickert*, 188 U.S. 432; *United States v. Quiver*, 241 U.S. 602; *United States v. Hamilton*, 233 Fed. 685; *In re Blackbird*, 109 Fed. 139; *In re Lincoln*, 129 Fed. 247; *State v. Rufus*, 237 N.W. 67.

* * *

"3. The Menominee Indian Mills are not liable for the State tax placed on tobacco products, where tobacco products are sold through the commissary of the mills, whether the products are sold to Indians or to other persons." 57 I.D. 129, 140-141 (1940).

With these opinions fresh in mind, Congress expressly chose to exclude reservation Indians from the purview of the Buck Act, 4 U.S.C.A. Sec. 109; McClanahan v. State Tax Comm'n of Arizona, *supra;* Warren Trading Post Co., v. Arizona State Tax Comm'n, 380 U.S. 685, 691 n. 18 (1965). As stated in a Solicitors opinion released three years after Congress passed the Buck Act:

> "That act, however, contains no indication of any intent on the part of Congress to interfere with the regulation by the Commissioner of Indian Affairs of trade with the Indians on Indian reservations or to burden the Indians with a tax to which they could not then legally be subjected. On the contrary, section 5 of the act declares that the permission given to the States shall not 'be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' While this declaration is somewhat awkwardly phrased the meaning is plain.

> Basic Indian immunities under the law in force prior to the enactment were not to be disturbed nor were new immunities to be created. The legality of State taxes on sales to Indians thus is to be determined not by but independently of the provisions of the act of October 9, 1940. Under this view, the opinion of May 8, 1940, is correct * * * ." 58 I.D. 562, 563 (Dec. 24, 1943). *See generally* The Department of the Interior's *Federal Indian Law* 867-873 (1958) (Oceana Publications ed. 1966).

What the Supreme Court said about Arizona's income tax in *McClanahan* is equally appropriate here:

> "Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C.A. Sec. 104 et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas. Sec. 106(a) of Title 4 grants to the States general authority to impose an income tax on residents of federal areas, but Sec. 109 expressly provides that 'Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' To be sure, the language of the statute itself does not make clear whether the reference to 'any Indian not otherwise taxed' was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S.Rep. No. 1625, 76th Cong.

3d Sess., 2, 4; 84 Cong. Rec. 10685 (1939), and this Court has so interpreted it. See Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 691, 85 S.Ct. 1242, 1245, 14 L.Ed.2d 165 n. 18 (1965). While the Buck Act itself cannot be read as an affirmative grant of tax exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." McClanahan v. State Tax Comm'n of Arizona, *supra* at 1264-65.

IV

Here, as in *McClanahan*, the Tax Commission contends that since it has only attempted to tax an individual Indian and not the tribe or reservation as such, its efforts must be sustained because tribal self-government has not been infringed.[2] And, relying upon the Arizona appellate court's decision in *McClanahan*, the state further contends that it is irrelevant whether its tax infringes upon the respondent's rights as an indivi-

[2] In support of this contention, the appellant relies upon cases such as Williams v. Lee, 358 U.S. 217 (1959), which state that the test for determining the validity of state action is "whether (it) infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. In that portion of the *McClanahan* opinion hereinafter quoted in the text of this opinion, the Supreme Court apparently limits the applicability of the *Williams* test to cases involving *non-Indians.*

dual Indian. The response of the Supreme Court to these contentions is instructive:

> "In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the State's premise is accepted, we reject the suggestion that the *Williams* test [1] was meant to apply in this situation. It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also Organized Village of Kake v. Egan, 369 U.S. 60, 75-76, 82 S.Ct. 562, 570-571, 7 L.Ed. 2d 573 (1962). In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.
>
> "The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaties and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed. On the contrary, this Court expressly rejected such a position only two years ago. In Kenner-

[1] See note 2, *supra*.

ly v. District Court, 400 U.S. 423, 91 S. Ct. 480, 27 L.Ed.2d 507 (1971), the Blackfeet Indian Tribe had voted to make state jurisdiction concurrent within the reservation. Although the State had not complied with the procedural prerequisites for the assumption of jurisdiction, it argued that it was nonetheless entitled to extend its laws to the reservation since such action was obviously consistent with the wishes of the Tribe and, therefore, with tribal self-government. But we held that the *Williams* rule was inapplicable and that '(t)he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction.' 400 U.S. at 427, 91 S.Ct. at 482. If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement.

* * *

"Finally, we cannot accept the notion that it is irrelevant 'whether the . . . . state income tax infringes on (appellant's) rights as an individual Navajo Indian,' as the State Court of Appeals maintained. McClanahan v. State Tax Commission, 14 Ariz. App. 452, 454, 484 P.2d 221, 223 (1970). To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the ques-

> tion has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them.' Williams v. Lee, *supra*, at 220 of 358 U.S. at 271 of 79 S.Ct. (emphasis added). In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." McClanahan v. State Tax Comm'n of Arizona, *supra* at 1266-67.

In the absence of congressional consent, the Idaho State Tax Commission had no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians. U.S. Const. Art. I, Sec. 8, cl. 3. Where, as here, Congress has manifested its intent to deny the states the power to collect such a tax, it is irrelevant that its imposition would not infringe upon tribal self-government. McClanahan v. State Tax Comm'n of Arizona, *supra*. The decision of the district court is correct and accordingly must be affirmed.

Judgment affirmed. Costs to respondent.

McQUADE AND McFADDEN, JJ., concur.

SHEPARD, J., dissenting.

I respectfully dissent. The majority discusses at length the State's ability to collect a sales tax upon goods sold by an Indian. In the case at bar, however, the plaintiff protests the State's seizure of 784 cartons of cigarettes. Apparently, the cigarettes lacked Idaho tax stamps.

In Tonasket v. State, 488 P.2d 281 (Wash. 1971) the

Washington Court was faced with an almost identical situation. In *Tonasket* the state also seized cigarettes not bearing the Washington tax stamp and charged the Indian owner with a criminal violation. The Washington Court, after extensively reviewing the pertinent state and federal statutes and the decisions of the United States Supreme Court, sustained the position of the State of Washington, On appeal the Supreme Court of the United States did not reverse the decision of the Washington Supreme Court. Instead, the Supreme Court vacated the judgment so the Washington Court could consider the effect of McClanahan v. State Tax Commission of Arizona, ___U.S. ___, 93 S.Ct. 1257 (1973).

The majority opinion herein suggests the Supreme Court of the United States "thereby indicated that the *principles* enunciated in *McClanahan* are applicable in cases such as this * * * ." I respectfully disagree.

Certainly, the opinion of the Supreme Court of Washington in *Tonasket* is not binding on this Court. Nevertheless, I find it well-reasoned, scholarly and highly persuasive. In my judgment the cavalier treatment of *Tonasket* by the United State Supreme Court only muddies further the troubled waters surrounding state jurisdiction over Indians. The Court's opinion in Mescalero Apache Tribe v. Jones, ___U.S. ___, 93 S.Ct. 1267 (1973) further compounds this confusion. *Mescalero* was issued the same day as *McClanahan*.

The Washington Supreme Court in *Tonasket* notes recent federal legislation enabling states to assume certain jurisdiction over Indians and Indian lands. The

State of Washington did assume such jurisdiction. In *McClanahan* the Court founded its opinion almost entirely on the supposed fact that Arizona had not assumed such jurisdiction. As a result of *McClanahan* and *Mescalero* and the lack of guidance offered by *Tonasket*, the courts are left to their own resources in grappling with the mind-boggling distinction between *Mescalero* and *McClanahan*. The Court in *McClanahan* stated:

> "We are far from convinced that when a State imposes taxes upon reservation members without their consent, *its action can be reconciled with tribal self-determination.*" (Emphasis supplied) 93 S.Ct. at 1266.

On the other hand, the *Mescalero* court had little difficulty in finding that when a tribe ran a ski resort on certain leased federal lands, the ski resort's income was subject to state taxation. The Court ruled such taxation was not an undue interference with tribal self-government. In *Mescalero* the court quoted with approval Shaw v. Gibson-Zahniser Oil Co., 276 U.S. 575, 579-581, (1928) and said:

> "'The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principle need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners * * * .
>
> "But to hold them immune would be inconsistent with one of the very purposes

> of their creation, to educate the Indians in responsibility * * * .'" 93 S.Ct. at 1273.

The Washington Court in *Tonasket* stated:

> "It is suggested by the plaintiff that the regulating and taxing of his sales of cigarettes by the state interferes with tribal government.
> * * *
> "The plaintiff in this case has entered into the commercial life of the community in which he lives. He sells a product manufactured by others, the sale of which the state has found it desirable and necessary to regulate. The plaintiff does not question the right of the state to impose a tax upon the sale of cigarettes generally. But he contends that he should be exempt from the duty of collecting and remitting the tax and should thus enjoy a competitive advantage over non-Indian sellers of cigarettes." 488 P.2d at 288.

I suggest that the State in the instant case did not interfere with tribal self-government of the Coeur d' Alene Indians. I believe the taxation of the plaintiff herein is no different than that of any other who has set up a business. Having entered commerce, the Indian plaintiff must shoulder his fair share of the community's tax burden.

BAKES, J., concurring specially and dissenting in part:

The majority of this Court has determined the Idaho cigarette tax to be a tax upon the retail sale of cigarettes. Therefore, the result reached by the majority is probably correct because the cigarettes in question here

were seized before they were sold at retail, and therefore technically no tax was due and owing by the plaintiff on them. However, in my view, the incidence of the tax imposed by the Idaho Cigarette Tax Act can occur, and in this case does occur much earlier in the chain of distribution than the retail sale, and this raises serious constitutional issues. However in view of the holding of the majority concerning the nature of the Idaho cigarette tax, no useful purpose would be served by an analysis of all of the possible constitutional ramifications which would result from a holding that the incidence of the Idaho cigarette tax occurs much earlier in the distribution chain than the retail sale.

APPENDIX III

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY, Plaintiff,	) No. 3666
vs	)
STATE OF IDAHO, STATE TAX COMMISSION	) COMPLAINT
Defendant.	)

Comes now the above named plaintiff and for cause of action alleges:

I.

Plaintiff is an Indian and is an enrolled member of the Coeur d'Alene tribe.

II.

Plaintiff has been operating cigarette stores on Indian Trust land located in Benewah County and was so operating on June 21, 1968.

III.

That on that date, Roy Dahl, an agent of, and acting under the authority of the Idaho State Tax Commission did wrongfully seize and take away 784 cartons of plaintiff's cigarettes located on Indian Trust land, which cigarettes are presently in the possession of said

Tax Commission. The Tax Commission has refused to re-deliver the cigarettes to plaintiff, although plaintiff has filed a written claim with the Tax Commission claiming ownership thereof, and a demand for their return to plaintiff.

IV.

That the State Tax Commission has no jurisdiction over commerce on Indian Trust land and had no right to go thereon and seize said cigarettes. The jurisdiction of said Indian Trust land rests solely in the Federal Government.

V.

That the plaintiff has no adequate remedy at law or otherwise, for the financial losses suffered by loss of future business, and loss of profits therefrom. Plaintiff is being deprived of an opportunity of earning his livelihood.

WHEREFORE, plaintiff prays:

1. That defendant and its agents be permanently enjoined from disposing of the 784 cartons of cigarettes claimed by the plaintiff.

2. Be permanently enjoined from interfering with plaintiff's operation of a cigarette vending business on Indian Trust land.

3. Defendant be required to return the 784 cartons of cigarettes to the plaintiff.

4. Or in the alternative, in the event the Court finds said seizure to be lawful, that the defendant be

required to deliver the 784 cartons of cigarettes to the plaintiff upon the delivery to the defendant by the Clerk of the District Court of the sum of $548.86, which is tendered into the Court with this complaint.

Dated this 1st day of July, 1968.

HAMILTON & HAMILTON
Attorneys for Plaintiff. Residence &
P.O. address: Coeur d'Alene, Idaho

APPENDIX IV

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY,	)	
Plaintiff,	)	No. 3666
vs.	)	
STATE OF IDAHO,	)	MEMORANDUM
STATE TAX COMMISSION	)	OPINION
Defendant.	)	

The above entitled action was heard before the Court on May 14th, 1971. At that time, upon the conclusion of the hearing, the plaintiff was granted thirty (30) days within which to file a brief and the defendant fifteen (15) days thereafter within which to file an answering brief. The plaintiff's brief was filed herein on June 14, 1971. The defendant's brief was due June 29, 1971. The defendant has not made or requested any extension of time within which to file said brief and the Court, therefore, concludes that defendant has waived the filing of its brief and that this matter is deemed submitted and ready for decision.

At the hearing on May 14, 1971, the facts were stipulated to the Court. From these facts it appears that Indians of the Coeur d'Alene Indian Tribe, namely John George Mahoney and Margaret Rose Mahoney, owned and had in their possession cigarettes. This

was upon Indian trust lands within the Coeur d'Alene Indian Reservation. The cigarettes were held for sale and were sold to both Indians and other non-Indian members of the general public.

The plaintiff in its brief has succinctly stated the issue:

> Does the State of Idaho have jurisdiction to levy and collect excise taxes on cigarettes and sales thereof, where such cigarettes are held for sale and sold by members of the Coeur d'Alene Tribe of Indians on trust lands within the Coeur d'Alene Indian Reservation?

The Court concludes this question must be answered in the negative.

As a corollary to federal sovereignty it is clear that state law has no force and effect, except as granted by federal law, within the territory of an Indian tribe in matters affecting Indians.

> Boyer - vs. Shoshone - Bannock Indian Tribes, 92 Idaho 257.

Nothing in the present record shows this case to come within any of the provisions of I.C. 67-5101 as to those matters upon which the state courts have jurisdiction of matters in Indian reservations. Nor is there any showing that there was any bilateral agreement between the Coeur d'Alene Indian Tribe and the State of Idaho subjecting the members of the tribe to the state's excise tax. (See Boyer vs. Shoshone-Bannock Indian Tribes, supra). It further appears that this position had been previously recognized admini-

stratively by the State of Idaho through an assistant attorney general speaking on behalf of the tax collector of the State of Idaho.

It is, therefore, concluded that the cigarettes were not subject to the excise taxes of the State of Idaho and were wrongfully seized by the defendant herein. The proceeds derived from the sale of said cigarettes should be delivered to the plaintiffs together with interest thereon and their costs of suit herein.

Will counsel for the plaintiff herein prepare Findings of Fact, Conclusions of Law and Judgment consistent herewith.

Dated and done this 19th day of July, 1971.

/s/ Watt E. Prather
District Judge

APPENDIX V

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY, AND MARGARET ROSE MAHONEY, Plaintiffs,	)	Case No. 3666
vs.	)	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
STATE OF IDAHO, STATE TAX COMMISSION, Defendant.	)	

The above-entitled action was heard before the Court in St. Maries, Idaho on May 14, 1971. Plaintiffs were represented by their attorney Jerrold E. Park of McFadden & Park, and the defendant was represented by Robert L. Miller, Assistant Attorney General; the facts having been stipulated by the parties. The Court, having considered the brief filed by plaintiffs and arguments of counsel and no brief having been filed by defendant, and being fully advised in the premises, rendered its decision and made and entered Findings of Fact and Conclusions of Law and Judgment, to which defendant filed timely objection. Such objection having been resolved and withdrawn on the basis of a stipulation of counsel filed herein, the Court hereby withdraws and sets aside the Findings, Conclusions

and Judgment heretofore entered and hereby makes and enters the following Amended Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action was originally filed by John George Mahoney, as plaintiff, but it appears from an affidavit of defendant, to which is attached a Bill of Sale, that John George Mahoney has sold and assigned his interest in the subject matter of this litigation to Margaret Rose Mahoney.

2. Plaintiff's attorney has moved to substitute Margaret Rose Mahoney as a party plaintiff, which motion has been granted and Margaret Rose Mahoney has been made the plaintiff herein, as successor in interest to the original plaintiff.

3. Plaintiffs John George Mahoney and Margaret Rose Mahoney are both enrolled members of the Coeur d'Alene Tribe of Indians.

4. In June, 1968 plaintiffs owned and had in their possession 784 cartons of cigarettes, which did not bear Idaho cigarette tax stamps. These cigarettes were located upon Indian trust lands within the Coeur d'Alene Indian Reservation in Benewah County, Idaho, and were held for sale and sold to Indian and non-Indian purchasers. On June 21, 1968 said cigarettes were seized by an agent of the Idaho State Tax Commission.

5. On or before September 18, 1968, by agreement of the parties, the cigarettes were sold for a

total sum of $1,484.15, which sum is being held by the State Tax Commission, pursuant to such agreement, in a suspense fund pending determination of this matter.

6. Upon the filing of this action, plaintiffs sought the issuance of a restraining order and injunction to prevent disposal of the cigarettes, in connection with which application plaintiff's attorney deposited the sum of $548.80 with the Clerk of this Court to secure the issuance of such order. Such security is no longer required and should be refunded to plaintiffs.

7. The facts of this matter were stipulated by the parties in open court at said hearing, and nothing in said stipulation or elsewhere in the record shows this case to come within any of the provisions of Idaho Code §67-5101 as to those matters upon which the State courts have jurisdiction of matters in Indian reservations. Nor is there any showing that there has ever been any bilateral agreement between the Coeur d'Alene Indian Tribe and the State of Idaho subjecting the members of the Tribe to the State's excise taxes.

CONCLUSIONS OF LAW

1. Margaret Rose Mahoney shall be and is hereby substituted as party plaintiff in this action.

2. The single issue presented by the stipulated facts herein is as follows:

> Does the State of Idaho have jurisdiction to levy and collect excise taxes on cigarettes and sales thereof, where such cigarettes are held for sale and sold by members of the Coeur d'Alene Tribe of In-

dians on trust lands within the Coeur d'Alene Indian Reservation?

This question must be and is answered in the negative.

3. The 784 cartons of cigarettes which are the subject matter of this action and sales thereof by plaintiffs on trust lands within the Coeur d'Alene Indian Reservation were not subject to the excise taxes of the State of Idaho.

4. The said cigarettes were wrongfully seized by the defendant from the plaintiffs herein.

5. The proceeds derived from the sale of said cigarettes, being $1,484.15, should be delivered to the plaintiff, Margaret Rose Mahoney, with interest thereon at the statutory rate from September 18, 1968 to date, in the amount of $260.00.

6. The $548.80 deposited by plaintiffs' attorneys in lieu of bond shall be returned to them and the bond exonerated.

7. The defendant, State of Idaho, State Tax Commission and its agents and employees shall be permanently enjoined from interfering with plaintiff Margaret Rose Mahoney's operation of a cigarette vending business upon trust lands within the Coeur d'Alene Indian Reservation.

8. The plaintiffs shall be awarded their costs in this action in the amount of $23.50.

Dated this 16th day of September, 1971.

/s/ Watt E. Prather
District Judge

APPENDIX VI

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

JOHN GEORGE MAHONEY AND MARGARET ROSE MAHONEY Plaintiffs, vs. STATE OF IDAHO, STATE TAX COMMISSION, Defendant.	)	Case No. 3666 AMENDED JUDGMENT

On the basis of the Amended Findings of Fact and Conclusions of Law made and entered this date in the above entitled action, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant, State of Idaho, State Tax Commission, its agents and employees, is permanently enjoined from interfering with plaintiff Margaret Rose Mahoney's operation of a cigarette vending business upon Indian trust lands within the Coeur d'Alene Indian Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Margaret Rose Mahoney have judgment against defendant, State of Idaho, State Tax Commission, for the principal sum of $1,-

484.15, interest thereon in the amount of $260.00, and costs in the amount of $23.50.

IT IS FURTHER ORDERED that the cash deposit made by plaintiffs' attorneys with the Clerk of this Court in lieu of bond, in the amount of $548.80, be refunded to plaintiffs' attorneys.

Dated this 9th day of September, 1971.

/s/ Watt E. Prather
District Judge

APPENDIX VII

4 U.S.C. Sections 105-110

§105

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

§106

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

§107

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch.

§108

The provisions of sections 105—110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

§109

Nothing in sections 105 and 106 of this title shall be

deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

§110

As used in sections 105—109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

APPENDIX VIII

15 U.S.C. Sections 375-378

§375

For the purposes of this chapter—

(1) The term "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

(2) The term "cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

(3) The term "distributor licensed by or located in such State" means—

(A) In the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail:

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

(4) The term "use", in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes.

(5) The term "tobacco tax administrator" means

the State official duly authorized to administer the cigarette tax law of a State.

(6) The term "State" includes the District of Columbia, Alaska, Hawaii, and the Commonwealth of Puerto Rico.

(7) The term "transfers for profit" means any transfer for profit or other disposition for profit, including any transfer or disposition by an agent to his principal in connection with which the agent receives anything of value.

§376

(a) Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall—

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or in-

voice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under sub-section (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

§377

Whoever violates any provision of this chapter shall be guilty of a misdemeanor and shall be fined not more than $1,000, or imprisoned not more than 6 months, or both.

§378

The United States district courts shall have jurisdiction to prevent and restrain violations of this chapter.

APPENDIX IX

RELEVANT IDAHO STATUTES

9-101. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference.

63-2501.—It is the intent and purpose of this act to levy a tax on all cigarettes sold, used, consumed, handl-

ed or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this act, that whenever any cigarettes are given away for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled or distributed in this state.

63-2502. —For the purpose of this act, unless otherwise required by the context:

(a). The word "wholesaler" means and includes every person who purchases, sells or distributes cigarettes to retailers for the purpose of resale;

(b). The word "retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale, or distributes cigarettes, irrespective of quantity or amount, or the number of sales.

(c). The words "retail selling price" mean the ordinary, customary price paid by the consumer for each package of cigarettes, before the tax levied by this act has been paid.

(d). The word "cigarette" means any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material, except where such wrapper is wholly or in the greater part made of tobacco.

63-2503.—From and after the first day of July, 1947, there is hereby levied, and there shall be collected

as hereinafter provided, a tax upon the retail sale of cigarettes, to an amount equal to three-twentieths of one cent for each cigarette.

62-2503.—There is hereby levied, and there shall be collected as hereinafter provided, a tax upon the retail sale of cigarettes, to an amount calculated as follows: (1) seven-twentieths (7/20) of one cent (1c) for each cigarette, the proceeds of which shall be deposited directly to the credit of the general fund; (2) to which shall be added one-twentieth (1/20) of one cent (1c) for each cigarette, the proceeds of which shall be deposited directly to the credit of the permanent building fund created in section 57-1108, Idaho Code; and, (3) to which shall be added one-twentieth (1/20) of one cent (1c) for each cigarette, the proceeds of which shall be deposited directly to the credit of the water pollution control fund. The total tax shall be nine-twentieths (9/20) of one cent (1c) for each cigarette. *(as amended)*

63-2504. —The tax on cigarettes, herein levied, is to be collected by the purchase of stamps, or the privilege of using a meter stamping machine, from the tax commission. The tax commission shall be the official agent of the state for the administration and enforcement of this act.

63-2505. —Any person offering for sale or selling cigarettes shall apply and obtain from the tax commission, upon the payment of one dollar, a registration certificate. Said registration certificate shall be personal and nontransferable, and shall be valid as long as the taxpayer shall continue in business. In case business is

transacted at two or more places by one taxpayer, a separate registration certificate for each place of business shall be required, but for such additional certificate no fee shall be required. Each certificate shall be numbered and shall show the name, residence and character of business of the taxpayer, and shall be posted in a conspicuous place at the place of business for which it is issued. When a place of business is changed, the taxpayer must return his certificate, and receive a new certificate for the new place of business free of charge.

63-2506. —Every person who sells cigarettes by means of a vending machine of any kind or character shall be required before engaging in such business, to obtain a certificate to engage in business as a retailer of cigarettes, and obtain a separate certificate for each machine used, and each machine so used shall be considered a separate place of business.

63-2507. —The tax commission is hereby authorized and required to design and have printed, stamps of a size and denomination to be affixed to each individual package, or to permit the use of meter stamping machines for imprinting stamps in lieu of separate stamps to be affixed. In the case of cigarettes the stamps shall be affixed on each individual package and also in such a manner that the stamps cannot be removed from the package without the stamp being mutilated or destroyed.

63-2508. —Every wholesaler, upon the receipt of cigarettes taxed herein, shall cause such to have the requisite denomination and amount of stamps affixed.

Every retailer, upon receipt of cigarettes not having the proper affixing of stamps, or stamped by a meter stamping machine, by a wholesaler, shall stamp or affix stamps immediately on each individual package or container. Provided, that any wholesaler or retailer engaged in interstate business, who shall furnish surety bond in a sum satisfactory to the commissioner of finance, shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without affixing the stamps required by this act. Every wholesaler, at the time of shipping or delivering the cigarettes taxed herein, shall make a duplicate invoice, showing complete details of the sale, and shall retain the duplicate subject to the inspection by the tax commission or its agent.

SUPREME COURT, U. S.
DEC 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-386

STATE OF IDAHO, STATE TAX COMMISSION,
Petitioner,

vs.

MARGARET ROSE MAHONEY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent respectfully prays that a Writ of Certiorari not be issued to review the final order of the Supreme Court of the State of Idaho, entered herein on July 8, 1974, reaffirming the Idaho Supreme Court's Decision in John George Mahoney, Plaintiff, Margaret Rose Mahoney, Plaintiff-Respondent v. State of Idaho, State Tax Commission, Defendant-Appellant, 524 P.2d 187 (Petitioner's Appendix II.)

OPINION BELOW

The final Order of the Court below on the Petition for Rehearing reaffirmed Mahoney, supra, (Petitioner's Appendix I.)

JURISDICTION:

Petitioners statement of jurisdiction is insufficient in that, except by reference to his appended Idaho State Court opinion it does not disclose anything about the content of the opinion or judgment sought to be reviewed.

QUESTIONS PRESENTED

Respondents believe that the following statement of Questions presented is somewhat more accurate than as worded by Petitioner.

1. Does the State of Idaho have jurisdiction to levy and collect a tax on cigarettes sold by members of the CDA Indian Tribe on Indian Trust Lands within the CDA Indian Reservation?

2. Does such extension of the Idaho State taxing Authority constitute an illegal interference with the sovereignty of the CDA Tribe and its exercise of self government?

3. Does the enforcement of the Idaho Cigarette Tax laws against such an Indian retailer violate Article 1, Sec. 8 of the U. S. Constitution (The Commerce Clause) as an unreasonable or unwarranted state interference with or burden on Indian Commerce?

4. Does the United States and the Tribe acting separately or jointly have exclusive authority and jurisdiction to license, tax and regulate such retail sales by Indians on Reservation lands?

5. Does the levying and collecting of the Idaho Tax against the Indian retailer illegally interfere with and impair the authority and jurisdiction of the United States and the Tribal Government in the same field?

CITATIONS

In addition to the Citations by Petitioner, the following are also involved:

1. Proclamation of President U. S. Grant, dated Nov. 8, 1873 establishing the Coeur d'Alene Reservation (Appendix I, page A-1).

2. The Agreement of 1887 and 1889, codified as 26 U. S. Stat. 1026, Fifty-first Congress, Session II, Ch. 543. (Appendix II, page A-2).

3. Law and Order Regulations of the Coeur d'Alene Tribe dated August, 1938, 25 C.F.R. 11.2. (Appendix III, page A-15).

4. Constitution and By-laws of the Coeur d'Alene Tribe (Appendix IV, page A-18).

5. Coeur d'Alene Tribal Law and Order Code (Appendix V, page A-24).

6. Coeur d'Alene Tribal Tobacco Ordinance (Appendix VI, page A-28).

7. The following provision of the Idaho Code:
   67 Idaho Code 5101-5103 (Appendix VII, page A-37).

8. The following provisions of the United States Code:
   25 U.S.C. 331 (Appendix VIII, page A-39).
   25 U.S.C. 461-463 (Appendix IX, page A-41).
   25 U.S.C. 476 (Appendix X, page A-43).
   25 U.S.C. 1301-1322 (Appendix XI, page A-45).

RESPONDENTS' STATEMENT OF CASE

Petitioner's statement of the Case while accurate is limited to the immediate facts of the situation involved in the arrest of John George Mahoney as he was engaged in the sale of cigarettes to the general public from his store located on Indian trust land of the Coeur d'Alene Indian Reservation. It does not concern itself with the highly important history of the establishment of the Coeur d'Alene Indian Reservation and subsequent events in which, in the exercise of its sovereign powers as a recognized Indian tribe, the Coeur d'Alene Tribe enacted a Constitution and By-Laws, established a tribal government, enacted a Law and Order Code and finally, during the pendency of this action, a Tobacco Ordinance licensing, taxing and regulating Indian smokeshops such as the one operated by John Mahoney.

1. Historical Background and Roots of Tribal Sovereignty

The Coeur d'Alene Tribe has existed from time immemorial in the geographical area which included the Coeur d'Alene Reservation as it is today. In 1955, the Indian Claims Commission, in ruling on the question of title in

the Tribe's claim, held that it had aboriginal title to about 4,000,000 acres surrounding its present location.

Favored by climate and geography, this tribe advanced faster than neighboring tribes and, under the direction of the missionaries beginning in about 1838, had by 1873 become largely agricultural and was described in the various departmental and congressional reports as one of the most civilized tribes in America.

In 1873 it entered into an Agreement ceding its vast aboriginal lands, and on November 8, 1873, President Ulysses S. Grant by Executive Order formed the Coeur d'Alene Reservation (Appendix I, page A-1).

In 1887 the Northwest Indian Commission headed by John V. Wright negotiated with the Coeur d'Alenes a new Agreement (Appendix II, page A-2) similar to the 1873 Agreement. This new Agreement, together with a supplemental Agreement of 1889 by which the Tribe agreed to cede additional lands from the north end of its reservation, were codified and approved by Congress in 1891 (26 U. S. Stat. 1026; 51st Congress. Sess. II – Ch. 543.)

We have, therefore, a Tribe that has functioned from time immemorial on the very lands that are here involved. It continued to so function until it began to formalize its tribal government, first by enacting its own Law and Order Regulations in August, 1938 (cover sheet, Appendix III, page A-15, and also cited at 25 CFR 11.2). Finally, the

Tribe, already operating as a quasi-municipal form of government adopted its formally recognized and approved Constitution and By-Laws (Appendix IV, page A-18).

This Constitution, while comprehensive, does not purport to be the sole source of tribal governmental power. Just as the United States has certain sovereign powers as a member of the family of nations which are assumed or said to be inherent or implied, so has the Coeur d'Alene Tribe. With its roots in the distant past, it has broad implied, inherent, unwritten powers of sovereignty that amplify and go beyond the specific written grants found in its Constitution or in Federal Statutes.

2. Change in Reservation Land Base

The Reservation land base of the 1873 Reservation was 590,000 acres. By the supplemental Agreement of 1889 (Appendix II, page A-8) the Tribe was induced to cede 240,000 acres from the north end of the 1873 Reservation leaving the present reservation of 350,000 acres. Much of this land base was eroded by homestead and mineral entry and, finally, by the checkerboarding result of the granting of fee titles and sales to non-Indians of many allotments. As a result, as Petitioner contends, this is a "checkerboarded reservation" with intermingled Indian and non-Indian lands.

This checkerboard nature of the Coeur d'Alene Indian Reservation is the rule rather than the exception. Most

modern reservations are similarly checkerboarded. It is acknowledged that there is some legal controversy about the extent of Tribal and Federal jurisdiction and the effective sovereignty of the tribes over non-Indian lands on the reservations. There is no citable legal authority, however, to distinguish the extent of tribal sovereignty and jurisdiction over Indian lands on a checkerboarded reservation and over Indian lands on a non-checkerboarded reservation.

3. Tribe's Current Law and Order Code and Tobacco Ordinance

In 1962 the Tribe adopted its present Law and Order Code (cover page and table of contents, Appendix V, page A-24). The Tribe has what the Code provides: a modern court, a full-time judge and personnel, and equipment and vehicles similar to that of a justice court system in any comparable rural area.

Its Law and Order Code is in a continual process of amendment and upgrading and, on July 13, 1972, the Coeur d'Alene Tribal Council adopted the CDA Tobacco Ordinance (Appendix VI, page A-28). The Appendix includes the letter of December 1, 1972 from the Area Director of the Bureau of Indian Affairs approving it. The Tribe, by this Ordinance, formalized and effectuated its preexisting jurisdiction and sovereignty to license and regulate Indian smokeshops and to levy an excise tax of 2½ cents per pack on all sales.

ts petition that

Petitioner states on page 8 of lene Tribal interest in Re-

> "There was no Coeur d prise; it was stipulated that
> spondent's business ente ng a private business enter-
> Respondent was conduct ning a tribal function."
> prise, and was not perfo ust be read now in the con-

This statement by Petitioner nnce which requires licenses
text of the tribal tobacco ordirts them to an excise tax and
for such smokeshops and subjcions. While there may not
various regulations and limitsmokeshop, it is closely gov-
be a tribal interest per se in the
erned and taxed by the Tribe its first decision of Septem-

The Idaho Supreme Court, ilix II), did not have knowl-
ber 5, 1973 (Petitioner's Appeinance (not adop'·d by the
edge of the Tribe's Tobacco Or
Tribe until July 13, 1972). se further facts were called

On Petition for rehearing th preme Court in the Amicus
to the attention of the Idaho S e Tribe. That Court, in its
Curiae Brief of the Coeur d'Al y 8, 1974 (Petitioner's Ap-
decision on rehearing, dated J pinion without comment.
pendix I) adhered to its former

GRANTING WRIT

ARGUMENT AGAINS ion Accurately States and v to Idaho Cigarette Tax

1. Idaho Supreme Court Dec Applies Federal Indian L Statutes

oner's argument is that it
The whole "thrust " of Peti aho's own Supreme Court
disagrees with the decision of I rom the United States Su-
and therefore needs "guidance" of state taxation.
preme Court in the complex fiel

This argument would be valid if the Mahoney tax case had been lost by Petitioner. Then the Indian Tribe or interests would, as they did in the *Tonasket* case in the State of Washington,, appeal to the United States Supreme Court for the so-called "guidance."

The Mahoney tax case is surprisingly unique. It is one of the very few instances, if not the only instance, in the history of Indian law when a State Supreme Court held in favor of the Indian tax exemption and immunity. The Idaho Supreme Court, in its well-reasoned opinion, interpreted the Idaho state law in its relationship to the relevant Indian exemptions and immunities and, by holding in favor of Respondent, gave the State Tax Commission the unequivocal "guidance" Petitioner states it needs.

This Court is asked by the State Tax Commission to review the decision of its own Supreme Court upholding the Indians' side of the case.

The Idaho Court's decision covered all bases.

a. It concluded by logic and by the wording of this Court's remand of the Tonasket case, that the "Supreme Court of the United States thereby indicated that the principles enunciated in McClanahan are applicable in cases such as this involving a state's attempt to tax on-reservation sales consumated by Indian sellers." It then stated:

> "The holding of the Court in *McClanahan* is perhaps best described by the Supreme Court itself in *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 93

S.Ct. 1267, 1270 (1973), released the same day as *McClanahan:*

> '(I)n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona,* 411 U. S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent'." (Petitioner's Appendix II, p. 24-25)

b. It discussed the Commerce Clause of the Federal Constitution and the Indian cases interpreting it and concluded that:

> "In the case before us today, the incidence of the tax falls squarely upon sales by an Indian on a reservation; this tax is nothing less than a direct tax upon commerce with the Indian tribes, and 'such taxation is not permissible absent congressional consent'." (Citing *Mescalero* and *McClanahan.*) (Petitioner's Appendix II, p. 30)

c. It discussed and considered the applicability of the Buck Act and stated: "With these opinions fresh in mind, Congress expressly chose to exclude reservation Indians from the purview of the Buck Act, 4 USCA Sec. 109." (Petitioner's Appendix II, p. 33)

d. It analyzed and discussed the extent to which there had to be an infringement on tribal self-government and, applying the principles enunciated in this Court's decision in *McClanahan,* concluded that there need not be a direct

infringement on tribal self-government. [Note: The Idaho Court did not at that time know of the Tribe's Tobacco Ordinance. Had it known of it, it would most certainly have found that while a direct infringement on tribal self-government was not required, there was in fact such an infringement.]

e. The Idaho Court then concluded that "In the absence of congressional consent, the Idaho State Tax Commission had no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller, whether the purchasers were Indians or non-Indians." (Petitioner's Appendix II, pg. 38)

f. It is obvious on reading the original opinion of the Idaho Supreme Court that the Court took great care and exercised a high degree of legal scholarship in reaching and wording its opinion. It did not let the matter rest there. It granted the Tax Commission's Petition for Rehearing. Every conceivable argument was advanced on rehearing with other states, other non-Indian interests, the Coeur d'Alene Indian Tribe and other tribes joining in the legal confrontation with copious briefs and arguments.

g. The Idaho Court on rehearing had the benefit of the decisions in the following cases:

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana ("Tribes") et al. v. John C. Moe et al., Civil No. 2145 (D. C. Mont. May 9, 1974) in which a three judge panel held that under the particular Montana taxing statutes an Indian smokeshop could be required to "pre-collect" cigarette taxes to be sold to non-Indians.

Walker River Paiute Tribe and Stephen King v. John Sheehan et al., Civil No. R-2888-BRT (D. C. Nev. May 3, 1974), which held that under a state taxing statute similar to that of Idaho it was a prohibited interference with commerce with an Indian reservation to intercept outside the Walker River Reservation shipments of untaxed cigarettes bound to cigarette outlets on the reservation.

h. The Court nevertheless entered its order on July 8, 1974 adhering "to the views expressed and the conclusion reached in our earlier opinion." (Petitioner's Appendix I)

Respondent respectfully suggests that it seems absurd that a State Tax Commission should seek "guidance" from the United States Supreme Court in the face of a decision by its own Supreme Court fully "guiding" it in the application of its tax laws to an Indian reservation. As a practical matter, how can this Court, except as it has already done in the *Williams v. Lee* 358 U. S. 217 (1958), *Warren Trading Post v. Tax Commission*, 380 U. S. 685 (1965), and the *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), family of cases, hope to frame a decision that can give sufficient "guidance" which considers and anticipates the differing state tax laws as well as their future amendments.

2. Petitioner Misunderstands and Misapplies the Tonasket Case

Contrary to Petitioner's analysis on page 12 of its petition, this Court, in remanding the *Tonasket* case to the Washington Supreme Court, implied that *McClanahan* was

controlling on *Tonasket*. This Court said in its remand:

> "The judgment of the Supreme Court of Washington is vacated, and the case is remanded to that Court for reconsideration in light of sections 6 and 7 of c. 157, 1972 Extraordinary Session Laws of the State of Washington, and this Court's decision in *McClanahan v. Arizona State Tax Commission, ante.* (411 U. S. 451, 93 S.Ct. 1941, 36 L.Ed.2d 385)

In effect, this Court recognizing the difficulty in issuing guidance or clarifying opinions for every set of state statutes asked the Washington Court to clarify its opinion in view of McClanahan and its own more recently enacted statutes.

It is interesting to note what the Washington Court did when faced with this remand. It merely held that the State of Washington had legally and validly assumed total State civil and criminal jurisdiction on the Colville Reservation and was therefore authorized to extend its cigarette excise tax to Indian retailers serving non-Indian customers upon the Reservation. Then, in considering its 1972 Extraordinary Session Laws, it found that Indian smokeshops such as the one operated by Tonasket on the Colville Reservation were being operated at this time in compliance with Washington State law and, under said Session laws, could sell untaxed cigarettes to non-Indians. (84 Wn.2d 164, 525 P.2d 744, August 8, 1974).

We are informed that that case is being readied for appeal to the U. S. Supreme Court.

3. Although Small in Numbers and Tribal Land Base, the Coeur d'Alene Tribe is as Viable and Sovereign as the Larger Navajo Tribe

Petitioner takes the position (page 13 of Petition) that whereas the Navajo Reservation is an "autonomous and viable self-government entity," the Coeur d'Alene Reservation is not. This is simply not true. As the Appendix of this brief and our Statement of the Case reflect, the Coeur d'Alene Indian Tribe since very early days has been considered to be one of the most viable, autonomous, advanced tribal entities in America. It has every attribute of tribal government.

Petitioner does not cite, and cannot cite, one case in this Court or any other court which makes a legal distinction based on land area, size of tribe and extent of tribal government which would indicate that a decision such as in *McClanahan* would have been any different if this Court had been dealing with a smaller tribe.

In alleging the lack of viability of the Tribe, Petitioner implies the argument that it should prevail because tribal members receive state services without paying taxes. This is an irrelevant argument and completely ignores the functions and activities of the Coeur d'Alene Tribe wherein the Tribe expends what income it does have in a wide variety of governmental and community services that characterize modern tribes.

4. The "Cluster of Decisions" Referred to by Petitioner Are Actually Consistent and Not Contradictory

Petitioner implies (Petition, page 15) that there are hopeless contradictions between a "recent cluster of decisions" in Washington, Nevada, Montana and this *Mahoney* case "which cries for leadership and direction from this Court." Actually, the cited cases can be reconciled but turn on the different State legal and factual backgrounds and demonstrate the difficulty of this Court going further than *McClanahan* in providing "leadership and direction."

Both *Confederated Salish and Kootenai Tribes et al. v. Moe et al., supra,* and *Walker River Paiute et al. v. Sheehan et al., supra,* recognize, as does *Mahoney,* that this Court's decision in *McClanahan* and earlier cases precludes the imposition of a state excise tax upon the retail sale of cigarettes by an Indian on the reservation. The *Confederated Tribes* case—erroneously, we believe—held that Montana could require an Indian seller to "precollect" a tax *imposed upon non-Indian cigarette purchasers.* But even the *Confederated Tribes* court denied the state any authority to impose a tax upon the Indians, either as cigarette purchasers or as unlicensed sellers.

It is not correct to assert, as Petitioner does at page 18 of its Petition, that "The Montana District Court adopted an entirely different reading of this Court's decision in *McClanahan.*" That Court—like the Supreme Court of Idaho and the U. S. District Court for the District of Nevada—in-

terpreted the *McClanahan* decision as applicable to taxes on sales by reservation Indians, but found the incidence of the Montana tax to fall elsewhere.

Additionally, the Montana District Court found on page 12 of its slip opinion that

> "pursuant to P. L. 280, 27 Stat. 488, August 15, 1953 the State of Montana assumed complete criminal and limited civil jurisdiction over Indians residing on the Flathead Reservation."

This is certainly not true of the Coeur d'Alene Reservation. Petitioner does not, and can not, assert that the Coeur d'Alene is what is called a "Public Law 280 Reservation" as is true on the Colville in *Tonasket* and apparently on the Flathead.

Petitioner suggests that *Tonasket* leaves room for argument that the on-reservation tax exemptions so clearly enunciated by a unanimous court in *McClanahan* were intended to extend only to Indian land and Indian income. But if *McClanahan* does not apply to cigarette taxes, why remand *Tonasket*?

Thus, all four of the Indian cigarette tax cases, *Flathead*, *Walker River*, *Mahoney* and *Tonasket*, are consistent in holding the State lacks jurisdiction and authority to impose excise taxes upon Indian sellers on the reservation—except, perhaps, when the Tribe has ceded general jurisdiction to the State, as was true in *Tonasket* and apparently in the Montana case.

5. The Idaho Court's Interpretation of the Commerce Clause

The writers are perplexed by Petitioner's statements on pages 14 and 15 of its Petition that the Idaho Court's reliance on either the Commerce Clause or the Buck Act "is completely unprecedented."

That Court not only correctly relied on the Commerce Clause but did so in a most scholarly manner. It, as has this Court, found in the Commerce Clause the constitutional "well spring" of the jurisdiction of the United States over Indian tribes and reservations. It begins its discussion with this:

> "The federal government's authority over Indian matters derives from the Federal Constitution's delegation to its responsibility for regulating commerce with Indian tribes and for making treaties . . ." (Petition, Appendix II, page 25)

As reflected on pages 26 and 27 of the Petition, the Idaho Court then "covered the waterfront" in supporting citations, including *Worcester, Boyer, Makah* and *Mescalero.* The Court then concluded that:

> ". . . the Commerce Clause applies with equal force to commerce 'with the Indian tribes.' It follows, therefore, that the Commerce Clause precludes the imposition of Idaho sales tax upon the on-reservation sale of cigarettes by members of an Indian tribe to non-Indian purchasers." (Citing McClanahan)

The very discussion by the Idaho Court, alluded to by Petitioner, highlights the absurdity of this argument. One need go no further than the much quoted publication of

the Office of the Solicitor of the U. S. Department of the Interior entitled "Federal Indian Law," pages 26 to 30 and other sections, and its famous predecessor by Felix S. Cohen, "Handbook of Indian Law," pages 10, 69, 91 and 353 and other sections, to know that the very basis of non-State taxing jurisdiction over Indians on Indian reservations is the Commerce Clause of the United States Constitution.

The first publication, on page 27, and the second publication (The Handbook), on page 91, contain this statement:

> "The Commerce Clause is the only grant of power in the Federal Constitution which mentions Indians. The congressional power over commerce with the Indian tribes plus the treaty making power is much broader than the power over commerce between the States."

Each quotation is followed by the citation of many of the landmark Indian cases decided by this Court.

6. The Idaho Court's Interpretation of the Buck Act

Equally surprising is the statement that the Court's reliance on the Buck Act is "unprecedented."

The treatment by the Idaho Court of the Buck Act can be characterized as "hornbook law." The Court merely acknowledged that, while the Buck Act (4 USCA 105-110) permits states to levy sales, use or incomes taxes within any federal area, Section 109 provides that

> "Nothing in Sections 105 and 106 of this title shall

be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed . . ."

Petitioner seems to ignore the Idaho Court's reliance upon and quotation from the *McClanahan* case (Petition, page 34) wherein it quoted this Court in its application of the Buck Act to the principles enunciated in *McClanahan*.

CONCLUSION

The Idaho State Tax Commission, in initially seizing the cigarettes in question, sought to enforce Idaho's Cigarette Tax laws against an Indian retailer doing business on Indian land on his own Reservation. With the legal issues thus laid, the District Court's and finally the State Supreme Court's scholarly opinions considered the applicable Idaho statutes but, in applying the Commerce Clause, the Buck Act and earlier decisions of the U. S. Supreme Court, found that the Idaho statutes were unenforceable in such a situation. The appealed from decision was correct both in its application of Federal Indian Law and of the Idaho Statutes, and therefore the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of November, 1974, three copies of Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho were mailed, postage prepaid, to Robert L. Miller, Chief Deputy Attorney General, State of Idaho, attorney for Petitioner, Box 36, Boise, Idaho 83807, and Daniel H. Israel, Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302, and I further certify that all parties required to be served have been served.

ROBERT D. DELLWO
Attorney for Respondent

APPENDIX

APPENDIX I

EXECUTIVE MANSION, *November 8, 1873.*

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

> "Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

U. S. GRANT.

APPENDIX II

FIFTY-FIRST CONGRESS. SESS. II. CH. 543. 1891.

Section 19. The following agreement entered into on the part of the United States by John V. Wright, Jared W. Daniels and Henry W. Andrews, Commissioners with the Coeur d'Alene Indians in Idaho Territory signed on the part of said Indians by Chief Andrew Seltice, and others which bears date March twenty-sixth, eighteen hundred and eighty-seven, and now on file in the Interior Department, is hereby accepted, ratified, and confirmed and is in the following words, to-wit:

Agreement with Coeur d'Alene.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes, "approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

Article 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

Article 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

Article 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls in the Territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry

W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

Article 4.

And it is further agreed that the tribe or band of Indians known as Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

Article 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

Article 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended

under the direction of the Secretary of the Interior as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

Article 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

Article 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene

Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

Article 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as it is just and proper.

Article 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

Article 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

Article 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be

allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

Article 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girl's school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

Article 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Sec. 20. That the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

AGREEMENT.

This agreement, made pursuant to an item of an Act of Congress, namely: Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H.

Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

Article 1.

For the consideration hereinafter named the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had to the following-described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

Article 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of five hundred thousand dollars, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

Article 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

Article 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult

male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur d'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Sec. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Coeur d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as hereinafter specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection of said Coeur d'Alene Indian Reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the purpose of meeting the requirements of articles two and three of the second agree-

ment aforesaid the sum of five hundred thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Coeur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

Section 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided,* That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and

twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further,* That the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioner of the General Land Office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

"Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one, with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted

the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

"Given under my hand and seal this 16th day of Sept'r., A. D. 1889.

his
"ANDREW x SELTICE.
mark.

APPENDIX III

LAW AND ORDER REGULATIONS

As amended August 3, 1938,
to apply to the coeur
d'Alene Indian Reservation.

1938 COEUR D'ALENE LAW AND ORDER REGULATIONS

CHAPTER 1

Courts of Indian Offenses

Sec. 1 *Jurisdiction*

The Court of Indian Offenses hereinafter referred to will be construed to mean the Coeur d'Alene Court of Indian Offenses.

A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by any Indian, within the reservation or reservations for which the Court is established.

With respect to any of the offenses enumerated in Chapter 5 over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.

For the purpose of the enforcement of these regulations, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a "reservation" shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

All Indians employed in the Indian Service shall be subject to the jurisdiction of the Court, but any such employee appointed by the Secretary of the

Interior shall have the right of appeal to the Secretary from any sentence of the Court and no such sentence appealed shall become effective until it shall have been approved by the Secretary.

APPENDIX IV

CONSTITUTION AND BY-LAWS OF THE COEUR D'ALENE TRIBE, IDAHO

(Revised-February 3, 1961)

PREAMBLE

We, the Indians of the Coeur d'Alene Reservation in Idaho, in order to build an independent and honorable life, and to promote the common welfare of the Tribe, do hereby ordain and establish this Constitution and By-Laws.

Article I — Territory

This tribal organization, to be known as the Coeur d'Alene Tribe, shall include all the trust and tribal lands within the original confines of the Coeur d'Alene Reservation as established by Executive Orders of June 14, 1867 and November 8, 1873, and shall extend to such other lands as may be hereafter added thereto.

Article II — Membership

Section 1. The membership of the Coeur d'Alene Tribe shall consist as follows of:

(a) All Indians whose names appear on the official census roll of the Coeur d'Alene Tribe as of July 1, 1940; Provided, that corrections may be made in said roll by the Tribal Council until January 1, 1962, subject to the approval of the Secretary of the Interior or his authorized representative. Applications for corrections of said roll must be filed with the Secretary of the Coeur d'Alene Tribal Council on or before July 1, 1961.

(b) All children of one-fourth or more Indian blood born subsequent to July 1, 1940, to any member of the tribe.

Section 2. The Tribal Council shall have power to promulgate ordinances, subject to the approval of the Secretary of the Interior or his authorized representative, governing future membership, provided that no individual of less than one-fourth Indian blood shall be admitted to membership hereafter.

Article III — Governing Body

Section 1. The governing body of the Coeur d'Alene Tribe shall be a Tribal Council consisting of seven members duly elected to serve three years.

Section 2. The Tribal Council shall elect from its membership (1) a chairman, (2) a vice-chairman, (3) a secretary-treasurer, and may appoint or employ such other officers and committees as may be deemed necessary.

Section 3. No person shall be eligible for election to the Tribal Council unless he shall be a member of the Coeur d'Alene Tribe and shall have resided within the boundaries of the reservation for a period of one year next preceding his election and be at least 21 years of age.

Section 4. The Tribal Council shall be the sole judge of the qualifications of its members.

Article IV — Nominations and Elections

Section 1. The candidates for membership in the Tribal Council shall be elected by popular vote at a meeting of the tribe on the first Saturday in May of each year.

Section 2. The first election of the Tribal Council hereunder shall be called and supervised by the Superintendent of the Northern Idaho Agency and the present Council within sixty days after approval of this Constitution by the Commissioner of Indian Affairs.

Section 3. At the first election, the three candidates receiving the highest number of votes shall hold office for three years. The two candidates receiving the next highest number of votes shall hold office for two years. The two candidates receiving the next highest number of votes shall hold office for one year. Thereafter, elections for the Tribal Council shall be held each year for two members of the Tribal Council except every third year when three shall be elected. After the first election, members of the Tribal Council shall be elected to serve for a term of three years, or until their successors are duly elected and qualified.

Section 4. All elections except the first shall be held in accordance with rules laid down by the Tribal Council.

Section 5. The time and place of voting shall be designated by the Tribal Council, and they shall certify to the election of the members of the Council within five days after said election.

Section 6. Any enrolled member of the Couer d'Alene Tribe who is twenty-one (21) years of age or over shall be entitled to vote.

Article V — Installation of Councilmen

Section 1. Each member of the Tribal Council and each officer elected or appointed hereunder shall take an oath of office prior to assuming the duties thereof.

Article VI — Vacancies and Removal from Office

Section 1. If a councilman should die, resign, be removed from office, permanently leave the reservation, or be convicted of a felony, the Tribal Council shall declare the position vacant and appoint a successor to serve until the next general election.

Section 2. The Tribal Council may, by a majority vote of the total membership of the Council, expel or suspend any of its members for neglect of duty or gross misconduct. Before any vote for expulsion is taken, such member or officer shall be given a written statement of the charges against him at least five days before the meeting of the Council before which he is to appear, and he shall be given an opportunity to answer any and all charges at a designated Council meeting. The decision of the Council shall be final.

Article VII — Powers and Duties of the Tribal Council

Section 1. The Tribal Council shall have the following powers subject to any limitations imposed by the Statutes or the Constitution of the United States:

(a) To represent the Tribe and negotiate with outside agencies and persons.

(b) To administer all tribal property by ordinances subject to the approval of the Commissioner of Indian Affairs.

(c) To borrow money, subject to the approval of the Commissioner of Indian Affairs, from the Indian credit fund or from any other governmental agency, and to pledge or assign future tribal income as security for such loans:

(d) To promulgate and enforce ordinances which shall be subject to the approval of the Secretary of the Interior or his duly authorized representatives governing the conduct of the members of the Tribe; to establish a reservation court and to adopt a suitable code for the maintenance of law and order which shall be subject to the approval of the Secretary of the Interior or his duly authorized representative;

(e) To levy license fees and taxes upon members through the adoption of ordinances that shall be subject to the approval of the Commissioner of Indian Affairs provided that any such ordinances shall not apply to members of the Tribe until approved by popular referendum;

(f) To exclude from the restricted lands of the reservation persons not legally entitled to reside thereon under ordinances which shall be subject to the approval of the Secretary of the Interior or his duly authorized representative;

(g) To employ legal counsel, the choice of attorney and the fixing of attorney fees to be approved by the Secretary of the Interior or his duly authorized representative.

Article VIII — Amendments

This Constitution and By-Laws may be amended by a majority vote of the qualified members of the Tribe who vote at an election called for that purpose by the Commissioner of Indian Affairs.

It shall be the duty of the Commissioner of Indian Affairs to call an election of any proposed amendment at the request of the majority of the Council, or upon presentation of a petition signed by at least thirty percent of the qualified voters of the Tribe, but no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

APPENDIX V

LAW AND ORDER CODE

OF THE

COEUR D'ALENE TRIBE OF INDIANS

ADOPTED: July 24, 1962 . . . Resolution 1963 (9)

AMENDED: August 30, 1962

Resolutions 32(62), 32(63), 33(63) and 34(63)

APPROVED: Bureau of Indian Affairs letter of August 24, 1962

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APPENDIX

Resolution 1963(9) – Dated July 24, 1962, adopting Law and Order Code

Amendments – Resolutions 31(63), 32(63), 33(63) and 34(63) dated August 30, 1962

Letter dated August 24, 1962, from the Bureau of Indian Affairs approving the Law and Order Code

APPENDIX VI

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Judicial, Prevention & Enforcement Services
Portland Area Office
Post Office Box 3785
Portland, Oregon 97208
December 1, 1972

Through: Superintendent, Northern Idaho Agency
Mr. Hillary Skanen
Chairman, Coeur d'Alene Tribal Council
Plummer, Idaho 83851

Dear Mr. Skanen:

Coeur d'Alene Resolution 11 (73), enacted July 13, 1972, governing the sale, distribution and taxation of tobacco products within the Coeur d'Alene Indian Reservation has been reviewed by the Regional Solicitor's office and this office. A copy of the Solicitor's comments is enclosed for your information.

Section 7 of the ordinance requires an operator to obtain a Federal Indian Trader's License before he may obtain a Tribal Tobacco Outlet License. It will be necessary for the Tribal Council to waive Section 7 as to any applicant who is a full-blood Coeur d'Alene since the law, as well as the regulations, authorizes an Indian of full blood to trade upon his reservation without obtaining a Federal Trader's License. This does not mean that a full blood is exempt from

obtaining the tribal license but only that the Tribe may not require that he also obtain a Federal Trader's License. Subject to the above paragraph, we approve the ordinance pursuant to authority delegated by Secretarial Order 2508 and 10 BIAM 3.1.

Sincerely yours,

Area Director

RESOLUTION

Coeur d'Alene Tobacco Ordinance

WHEREAS, the Coeur d'Alene Tribal Council as the governing body of the Coeur d'Alene Indian Tribe is charged by the Tribal Constitution and By-Laws to manage the affairs of the Coeur d'Alene Tribe and has the responsibility of protecting the health, security and general welfare of the Tribe and its members, and

WHEREAS, the State of Idaho is without jurisdiction on the Coeur d'Alene Indian Reservation to regulate and control Indian Smoke Shops or other outlets operated by Tribal members, and

WHEREAS, the Coeur d'Alene Tribal Council deems it essential to the health, security and general welfare of the Coeur d'Alene Tribe and its members to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution and sale on the Coeur d'Alene Indian Reservation,

NOW, THEREFORE, the Coeur d'Alene Tribal Council does hereby promulgate and enact the following ordinance:

AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products
within the Coeur d'Alene Indian Reservation

Section 1. *Title*

This ordinance shall be known as the Coeur d'Alene Tobacco Ordinance.

Section 2. *Definitions*

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(1) "Tribe" shall mean the Coeur d'Alene Indian Tribe.

(2) "Council" shall mean the Coeur d'Alene Tribal Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Tobacco Outlets" shall mean a Tribally licensed retail sales business selling tobacco products on the Coeur d'Alene Indian Reservation.

(6) "Operator" shall mean an enrolled member of the Coeur d'Alene Tribe licensed by the Tribe to operate a Tobacco Outlet.

Section 3. *Licensing of Tobacco Outlets.*

The Council may license one or more Tobacco Outlets within the Coeur d'Alene Indian Reservation.

Section 4. *Nature of Outlet.*

Each Tobacco Outlet licensed hereunder shall be managed by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

Section 5. *Application for Tobacco Outlet License.*

Any enrolled member of the Coeur d'Alene Indian Tribe may apply upon an application form provided by the Council for a Tobacco Outlet license. The Tribal Secretary-Treasurer shall receive and process applications, and be the official representatives of the Tribe and the Council in matters relating to Tobacco Outlets excise tax collections, etc. Each application shall be accompanied by an application charge or fee of $50.00.

Section 6. *Tobacco Outlet License.*

Upon approval of an application, the Council shall issue the applicant a Tobacco Outlet license for a one-year period which shall entitle the operator to establish and maintain one Tobacco Outlet on the Coeur d'Alene Indian Reservation. The license shall be nontransferable. It shall be renewable at the discretion of the Council each year by filing a new application form and payment of the application fee as provided in Section 5.

Section 7. *Trader's License*

No tobacco Outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's license from the Superintendent of the Northern Idaho Indian Agency.

Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's Tobacco Outlet license.

Section 8. *Excise Tax Imposed.*

There is levied and there shall be collected as hereinafter provided, a tax upon the distribution of all cigarettes sold or distributed by a Tobacco Outlet in the amount of 2½ cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be added to the retail selling price of tobacco products sold to the ultimate consumer.

Section 9. *Purchase of Tobacco Inventory.*

All wholesale purchases of cigarettes and tobacco products by a Tobacco Outlet shall be from wholesalers within the State of Idaho. Exception to this section can be made as to special cigarette or other tobacco products that can not be purchased from an Idaho Wholesaler. The Tribe shall have no legal responsibility for any unpaid bills owed by a Tobacco Outlet to a wholesale supplier or to any other person. The Operator shall make arrangements with his wholesalers to send copies of all his Purchase Invoices to the Tribal Office, Plummer Sub-Agency.

Section 10. *Restricted Sales to Non-Indians.*

An operator may not sell more than five cartons of cigarettes per sale to a non-Indian. The Council may restrict

sales of other tobacco products to non-Indians as it deems necessary.

Section 11. *Restricted Sales to Minors.*

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 12. *Other Business by Operator.*

An operator may conduct another business simultaneously with managing a Tobacco Outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 13. *Tribal Liability and Credit.*

An operator is forbidden to represent or give the impression to any supplier or any other person with whom he does business that he is an official representative of the Tribe, authorized to pledge tribal credit or financial responsibility for any of the expenses of his business operation. The operator shall hold the Coeur d'Alene Indian Tribe harmless from all claims and liability of whatever nature. The Tribal Council may revoke the operator's Outlet License if it is not operated in a business like manner or if it does not remain financially solvent or does not pay its operating expenses and bills before they become delinquent.

The operator shall maintain at his expense adequate insurance covering liability, fire, theft, vandalism and other insurable risks. The liability insurance shall have coverage of at least $10,000.00 per person and $25,000.00 per incident.

Section 14. *Audit and Inspection Bond.*

All of the books and other business records of the Tobacco Outlet shall be available for inspection and audit by the Tribal Council or its authorized representative at any reasonable time.

The excise tax owed the Tribe shall be remitted to the Tribal office monthly with reports thereof on forms to be supplied by the Tribe. The operator shall furnish a satisfactory bond to the Tribe in the principal amount of $10,000.00, guaranteeing his payment of excise tax.

Section 15. *Revocation of Tobacco Outlet License.*

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's Tobacco Outlet license as well as enforcement of the penalties provided in Section 16 below.

Section 16. *Violation—Penalties.*

Any person violating the provisions of this ordinance shall be guilty of an offense and subject to a fine in Tribal Court of not less than $50.00 nor more than $250.00 and forfeiture of all of the remaining stock of tobacco products distributed hereunder and situate in his Tobacco Outlet. The tribal law enforcement officers shall be empowered to seize forfeited tobacco products.

Section 17. *Separability.*

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons of circumstances is not affected.

CERTIFICATION

The foregoing resolution was adopted by the Coeur d'Alene Tribal Council at a meeting held the 13th day of July, 1972, at Plummer Sub-Agency, near Plummer, Idaho, with the required quorum present, by a vote of 4 for and 0 against.

APPENDIX VII

Idaho Code

CHAPTER 51

Jurisdiction in Indian Country

67-5101. State jurisdiction for civil and criminal enforcement concerning certain matters arising in Indian country.—The state of Idaho, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280) hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state, as Indian country is defined by title 18, United States Code 1151, and obligates and binds this state to the assumption thereof:

A. Compulsory school attendance

B. Juvenile delinquency and youth rehabilitation

C. Dependent, neglected and abused children

D. Insanities and mental illness

E. Public assistance

F. Domestic relations

G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof. [1963, ch. 58, § 1, p. 224.]

67-5102. Additional state jurisdiction with consent of tribe governing body.—Additional state jurisdiction in criminal and civil causes of action may be extended to particular reservations or Indian country with the consent of the governing body of the tribe occupying the Indian country effected [affected] by the assumption of such additional jurisdiction. This may be achieved by negotiation with the tribe or by unilateral action by the tribe. In every case the extent of such additional jurisdiction shall be determined by a resolution of the tribal governing body and become effective upon the tribe's transmittal of the resolution to the

attorney general of the state of Idaho. Such resolution may effectively accept jurisdiction as to any particular field of criminal or civil jurisdiction. All state jurisdiction extended by virtue of this act shall be concurrent (and not exclusive) with jurisdiction in the same matters existing in the tribes or the federal government. [1963, ch. 58, § 2, p. 224.]

67-5103. Matters excepted from state jurisdiction.— Nothing in this act shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof. [1963, ch. 58, §3, p. 224.]

APPENDIX VIII

25 U.S.C. 331

INDIANS

§ 331. Allotments on reservations; irrigable and nonirrigable lands

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided*, That the remaining area to which any Indian may be entitled under existing law after he shall have received his

proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require. Feb. 8, 1887, c. 119, § 1, 24 Stat. 388; Feb. 28, 1891, c. 383, §1, 26 Stat. 794; June 25, 1910, c. 431, § 17, 36 Stat. 859.

APPENDIX IX

25 U.S.C. 461-463

MISCELLANEOUS

PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

§ 461. Allotment of land on Indian reservations

No land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian. June 18, 1934, c. 576, §1, 48 Stat. 984.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress. June 18, 1934, c. 576, § 2,4, Stat. 984.

§ 463. Restoration of lands to tribal ownership; protection of existing rights; Papago Indian Reservation

(a) The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by sec-

tions 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title: *Provided further,* That this section shall not apply to lands within any reclamation project authorized before June 18, 1934, in any Indian reservation.

(b) (1), (2) Repealed. May 27, 1955, c. 106 § 1, 69 Stat. 67.

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479, of this title, except under permit from the Secretary of the Interior approved by the Papago Indian Council: *Provided,* That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians on this reservation: *Provided further,* That the appropriation of living water heretofore or hereafter affected, by the Papago Indians is hereby recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes. June 18, 1934, c. 576 § 3, 8 Stat. 984; Aug. 28, 1937, c. 866, 50 Stat. 862; May 27, 1955, c. 106.

APPENDIX X

25 U.S.C. 476

§ 476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local

Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

APPENDIX XI

25 U.S.C. 1301-1322

CHAPTER 15.—CONSTITUTIONAL RIGHTS OF INDIANS (NEW)

SUBCHAPTER I.—GENERALLY

§ 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Pub. L. 90-284, Title II, §201, Apr. 11, 1968, 82 Stat. 77.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable

search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Pub. L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Pub. L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.

§ 1311. Model code

The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual, (3) establish proper qualifications for the office of judge of the court of Indian offenses, and (4) privide for the establishing of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this subchapter, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

Pub. L. 90-284, Title III, § 301, Apr. 11, 1968, 82 Stat. 78.

§ 1312. Authorization of appropriations

There is hereby authorized to be appropriated such sum as may be necessary to carry out the provisions of this subchapter.

Pub. L. 90-284, Title III, § 302, Apr. 11, 1968, 82 Stat. 78.

§ 1321. Assumption by State of criminal jurisdiction—Consent of United States; force and effect of criminal laws

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust

by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Pub. L. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78.

§ 1322. Assumption by State of civil jurisdiction—Consent of United States; force and effect of civil laws

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Alienation, encumbrance, taxation, use, and probate of property

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Force and effect of tribal ordinances or customs

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 90-284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79.